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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 769

SKYLINE HOMES, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

REPLY BRIEF OF PETITIONER SKYLINE HOMES, INC.

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WO. 2-8715—WO. 2-8732

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(Numbers in parentheses are references to the pages of the transcript of the Pre Trial Hearing and the transcript of the testimony taken before the Special Master, unless otherwise indicated.)

Because of the several inaccuracies as to facts and law contained in the Brief of the National Labor Relations Board, we feel obliged to file a reply brief.

On March 19, 1964, the company's counsel, at the regional office of the NLRB in Tampa, made known that the required notices to be posted had been lost or mislaid in the moving of the company's office in Ocala, and requested that a new set of notices be furnished accordingly.

During this conference, the Regional office counsel delivered to Skyline's counsel another set of notices that were to be posted. Skyline counsel, upon leaving the regional offices of the NLRB in Tampa, drove directly to Ocala and upon arrival there, the notices were immediately posted, all this being done on the same day (285-287).

At the same time, counsel delivered a petition to the regional office seeking a representation election at the Ocala plant. Counsel for the regional office of the NLRB claimed that such a petition could not be processed, and furnished a list of legal citations in support of that position. Counsel for Skyline stated that he would look over these authorities and advise counsel for the regional office whether he was in accord with such position, and if he were not, he would insist upon the petition being processed in the usual manner.

Skyline counsel later reviewed the citations claimed by the regional office counsel to be controlling as to a representative petition, and having considered the same, advised the Regional office in Tampa by letter that he was not in accord with such claim and that in his opinion Skyline had a right to have its petition considered and passed upon.

At the first meeting that occurred between the union and the company on March 20, 1964, Skyline counsel did not agree to have a letter sent to Skyline employes as requested by the union representative, but urged that bargaining begin immediately on whatever demands the union

had concerning a proposed contract. At this first meeting it developed that the union representatives had no proposals of any kind to offer, having come unprepared for that purpose. It was the union that suggested that that first session terminate and that another meeting for the purpose of negotiation take place in the near future at a time to be mutually agreed upon (123). To this the company assented.

At the second meeting on April 2, the union presented sheaves of typewritten copy without any reference to wages, hours or working conditions. The Trial Examiner described this as "boiler plate" (249). Again Skyline's counsel asked for specific provisions on wages, hours and working conditions, and again the union representatives were unprepared to furnish any such information (138-139). It was at this second meeting that counsel for Skyline advised the union representatives that although the company doubted that the union represented a majority of the employes involved, the company would negotiate with the union as directed by the mandate of the Court and the order of the National Labor Relations Board.

Company counsel also advised the union representatives that while the regional office had denied the petition for representation election, an appeal was being taken and was pending before the NLRB but despite this appeal, the company was ready and willing to continue to bargain in negotiations with the union as ordered by the NLRB (146-147). Again the union had no specific proposals for wages, hours or working conditions that could be discussed. It was at this second meeting that the union representatives in asking for another and third meeting promised to have such proposals ready when next they met. This third meeting was to be held in the near future

at which the questions of wages, hours and working conditions could be discussed (176). The second meeting was then adjourned at the request of the union representative, which was to be followed by the next (third) meeting at a time to be mutually agreed upon.

Instead of the third meeting taking place as agreed upon between the union and the company, the union wrote a letter to the company on April 6, 1964, breaking off all negotiations unless the company agreed to a formula which was wholly unnecessary and had nothing to do with wages, hours and working conditions. The hearing before the Special Master disclosed that this letter of April 6 resulted after the union had met with representatives of the regional office of the NLRB in Tampa, Florida (170-173; 194, 235). This demand was made despite the fact that the union representatives in their testimony, and the Special Master, both at the preliminary pre-trial hearing and during the course of the hearing, stated that recognition of the union did not have to be spelled out in so many words nor did it have to appear in the contract. At the pre-trial hearing, the Special Master in discussing the issue of recognition, said (41, 42):

> "Well, let me say this: First of all, the union knew at that time they had a court order which designated them as exclusive bargaining agent for the employees that was already fully adjudicated. And why couldn't the union have gone ahead and said, 'Well, we will straighten this out as we go along'? Just because they did not sign or agree to that clause did not mean that something couldn't be broken down. I suggested something, a caption the way the thing would be signed—it could have been a working arrangement. As to that, they might have searched the mind of Mr. Davidow and asked what his objections were and couldn't it be straightened out.

> "I think the union—maybe it made a tactical error even, if you want to talk in terms of tactics—in not going on and presenting these things if it had them."

The fact of the matter is that up to and including the second meeting on April 2, 1964, the so-called claim of recognition by the union had not been a bar to the carrying on of negotiations. The record is replete with requests on the part of the employer, through its counsel, for continuation of negotiations. The insistence of counsel for Skyline upon negotiating on matters of wages, hours and working conditions was in keeping with the mandate of the Court of Appeals, which provided:

> "it is hereby
>
> "Ordered, adjudged and decreed by the United States Court of Appeals for the Fifth Circuit that Skyline Homes, Inc., its officers, agents, successors, and assigns shall:
>
> "1. Cease and desist from:
>
> "(a) Refusing to *bargain collectively in good faith concerning wages, hours, and other terms and conditions* of employment with the United Brotherhood of Carpenters and Joiners of America, Carpenters Union No.2292, *as the exclusive representative of all its employees in the following appropriate unit:* All production and maintenance employees of Skyline Homes, Inc. employed at its Ocala plant, exclusive of all other employees and all supervisors as defined in Section 2(11) of the National Labor Relations Act (hereinafter called the Act);" • • • (Emphasis ours.)

which is precisely what management repeatedly sought to have brought about and which the union, after consultation with and advice of the regional office, refused to do by presenting a fictitious condition.

There is no showing of any kind that the company had committed any act which tended to or did in fact dissipate the claimed union strength among the employes of the company. The hearing before the Special Master in 1964 disclosed for the first time, so far as the company is concerned, that at no time did any employe ever belong to the union; at no time did the union ever seek to persuade or obtain membership in the union from any of the company's employes (154). There was the definite statement by the union representative that no effort was made at any time to organize the employes of the company (155). There was no testimony of any kind that any act of the company deterred anybody from joining the union.

A general discussion occurred at the Pre-Trial hearing before the Special Master on March 25, 1965, among the Special Master, counsel for the NLRB and counsel for the company. It was brought out that at the time of the original proceedings in 1961, respondent had 34 employes (38). At the time of the Pre-Trial hearing there were closer to 60 than 50 employes (39). The Special Master made the statement to the effect that the rule as to not permitting an employer to "propagate by his own doing" was not applicable in the instant case where there was an increase of employes from 20 to 60—"that was not due to the employer's wrongdoing", "that is entirely different. So it is not true of this result we have today, the disproportionate result, if that is the case, of the employees not having the union is due to the employer" (39).

At no time before or during the hearing was any question raised concerning the delay in posting the Board's notices, a delay which was beyond the control of the company by reason of its offices having been moved. Counsel for the company explained what had happened, which was not challenged by anybody at any time (285-287).

ARGUMENT

1.

Petitioner's basic contention goes beyond the claim that the record does not provide clear and convincing support for the findings of the Court of Appeals that the company failed to bargain in good faith, that it wilfully delayed in posting the notices to employes.

There is absolutely no testimony of any kind in the record to justify such an erroneous decision on the part of the Court of Appeals. The case quoted by counsel in support of its position, when it seeks to minimize the gravity of the erroneous finding of the Court of Appeals, does not offer any support for such a contention. On the contrary, this case, *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, quoting Rule 52(a) of the Federal Rules, provides, in part:

> "Findings of fact shall not be set aside unless clearly erroneous," * * *

In the instant case the finding of the Court of Appeals is not only erroneous, but is based upon non-existent facts.

The record establishes unequivocally that there had been two meetings for negotiation, both of which were adjourned at the behest of the union representatives. On both occasions the union representatives did not have ready or prepared the salient points for negotiation as laid down by the Court of Appeals, namely, questions of wages, hours and other terms and conditions of employment (the last phrase is synonymous with working conditions).

2.

We take issue with the claim of the NLRB counsel that the case of *International Ladies' Garment Workers' Union v. National Labor Relations Board,* 366 U.S. 731, "is plainly without substance." In the case at bar, the testimony at the hearing before the Special Master disclosed that at no time did any of the employes belong to the union. In the case *supra,* the employer was led to believe that the union did represent a majority of its employes and did in good faith bargain. It was disclosed afterward that the representation of the union was unfounded and the employer was found guilty of an unfair labor practice. In the case at bar, not only did the company feel that the union did not represent a majority, but there was added to this the fact that a group claiming to represent a majority of the employes, through their own counsel, had filed a petition with the regional office of the NLRB for an election to deny the right of the Carpenters Union to represent them. The company in the case at bar was therefore in exactly the same position as the situation in the *International Ladies' Garment Workers'* case *supra.*

At the time of the hearing before the Special Master, the number of employes had increased from 34 to between 35 and 60. The Special Master at the Pre-Trial hearing recognized the fact that the increase in employes was due to the business having improved and that this was not a situation where there was a diminution of union representation due to the employer's wrongdoing (39).

We are constrained to again call this Court's attention to the following salient facts:

(1) At no time was a single employe a member of the union.

(2) The union at no time made any effort to persuade any of the employes to become a member of the union.

(3) At no time was any effort made by the union to organize the employes of the company.

(4) The continued willingness of the company to negotiate with the union under the direction of the Court and the NLRB.

(5) The union terminated the negotiation that had been carried on through two meetings.

It stands undisputed that the union broke off negotiations after the union representatives had a conference with the director of the regional office of the NLRB. It was admitted that at the second meeting on April 2, 1964, which was adjourned at the request of the union representatives, the union representatives were to set another date within approximately two weeks and come back with definite proposals on wages, hours and working conditions. It stands undisputed that the union representatives at the April 2 meeting came with 19 or 20 pages of a proposed contract (96-98), of which the first three pages (which were the only ones presented to the employer) were matters of preamble (101-104).

The Special Master questioned the union witness: "Now, do I understand that you had come into this conference room with a completed proposed contract, proposed contract in full?" and the witness answered, "The contract was not completed, no, but a large proportion of it was. It was completed to the point of—to the point that we could go until we had closer contact with the company and could get certain information." (98) And this proposed contract was to be presented without the union coming up with any

concrete proposals as to wages, hours and working conditions. The employer requested a short contract of two or three pages covering the subjects stated in the decree of the Court of Appeals. Obviously the inability of the union to come up with any concrete proposals of wages, hours and working conditions was due to the fact that it did not have a single employe as a member of its union.

3.

It is difficult to answer the specious argument contained in Section 3 of the Brief of the NLRB. If, as is admitted, the company had the right to send the letters to its employes expressing its opinion, then how can those letters be used as the background to build up a petition for contempt? The contents of the letters to the employes were neither erroneous nor misleading. The company had the right to express its opinion both as to the lack of the union's majority backing and its expectation that an election would be held. The National Labor Relations Act itself specifically provides that the employes have the right to engage in all activities set forth, but • • • "shall also have the right to refrain from any or all of such activities," • • • (Sec. 7, National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.)). It became and was the duty of the National Labor Relations Board to dismiss its contempt proceedings when it learned at the hearing before the Special Master that no employe of the company had joined the union and the union had never sought to organize the employes. The contempt proceeding of the NLRB brought about the incredible situation of charging the company with refusing to bargain when the record conclusively shows that the union had broken off negotiations and continued to refuse to bargain despite the efforts of the company to persuade the union to meet again.

CONCLUSION

We respectfully submit that the questions presented in the petition for Writ of Certiorari are of outstanding significance in the field of labor relations and constitutional rights, and that unless certiorari is granted, petitioner will suffer great and irreparable injury.

Respectfully submitted,

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